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Daily News

EPA Works To Refine Existing Authorities To Oversee Fracking Operations

Posted: August 9, 2012

EPA is working to refine its analysis of its existing legal authorities for regulating hydraulic fracturing and other aspects of natural gas development, a move that appears aimed at overcoming limits on the agency's current authorities that may have stymied some enforcement actions but which Congress appears unlikely to address.

Agency attorneys "continue to assess how these authorities would apply in the context of a particular factual situation," one informed source says.

While Sen. Ben Cardin (D-MD) and other Democratic lawmakers have called on Congress to provide EPA with new authorities to address fracking, an overview of the agency's existing authorities, which it provided to Cardin last year, touts a range of existing oversight powers under many environmental laws, including possible avenues for enforcement.

While EPA acknowledges that its authority to regulate or respond to fracking is "limited by exemptions established under several of the principal environmental statutes," the previously undisclosed March 8, 2011 letter to Cardin details a host of available authorities that it could use to oversee fracking operations. The list includes section 112(r), the so-called "general duty" clause, of the Clean Air Act, significant new use rules (SNUR) issued under the Toxic Substances Control Act (TSCA), TSCA section 4 authority to require extensive toxicity testing of fracking chemicals, the Resource Conservation & Recovery Act (RCRA) – which EPA warns could apply to some fracking wastes in spite of existing exemptions, Superfund reporting provisions and a host of others.

"Please be assured that EPA will use its authorities, consistent with the law and best available science, and in coordination with our state and local partners, to protect communities across the nation from water quality, human health, and environmental impacts associated with natural gas production activities," EPA told Cardin, chairman of the Senate environment committee's water and wildlife subcommittee, in the letter.

The letter appears to respond to Democrat inquiries about whether the agency would require additional statutory authority to regulate fracking -- given indications from Cardin that he was investigating whether current EPA regulations are adequate for addressing risk posed by hydraulic fracturing, or fracking, and whether the agency is adequately enforcing the requirements.

Cardin and other Democrats have also sponsored legislation that end existing exemptions in the Safe Drinking Water Act (SDWA), Clean Water Act and Clean Air Act to address the practice.

EPA's letter could preview the findings of a pending Government Accountability Office (GAO) report that Cardin requested in June 2011 but which has not yet been released. In his request to GAO, Cardin sought a sweeping review of potential adverse effects of fracking on drinking water and surface water

quality, including the scope of federal regulations governing the process.

"What actions have federal agencies taken to ensure that operators are following [existing] requirements?" Cardin said in a June 2011 press release announcing the GAO request. "What courses of action (or areas of jurisdiction) are available to federal agencies that have not been employed?"

EPA's Legal Authority

Over the past two years, EPA has struggled to find solid legal authority to act with respect to fracking, which has historically been governed by state regulations.

Fred Hauchman, director of the Office of Science Policy within the agency's Office of Research & Development, told the National Association of Counties in March that the agency is doing "a pretty comprehensive look at all the statutes" to determine where "holes" may allow for additional oversight or regulation.

Several statutory exemptions in environmental laws, including the SDWA waiver and the air act, further complicate the issue, leaving the agency on shaky legal ground.

While EPA in its letter points to a range of existing statutory provisions it says could be used to oversee fracking and other aspects of natural gas expansion, EPA has struggled in enforcement cases where it has tried to apply that authority. In a case in Parker County, TX, for example, EPA withdrew a SDWA order it had issued to Range Resources for suspected contamination after the company mounted a constitutional challenge.

Similarly, the agency is facing broad criticisms, and evidentiary hurdles, in its bid to use Superfund authority to inspect alleged groundwater contamination near fracking activities, in Pavillion, WY and Dimock Township, PA. The evidentiary hurdle stems in part from the law's exemption for petroleum and related substances, including natural gas, forcing EPA to prove that hazardous substances, many of which are naturally occurring, stem from fracking.

While EPA acknowledges such limitations, the agency is also pointing to provisions of statutes where it indicates there may be opportunity for application to fracking. For example, the letter to Cardin points out that several TSCA regulations may apply to chemicals widely used in natural gas drilling, including its premanufacture notification requirements, which force manufacturers to notify the agency before beginning to manufacture a new substance before it enters into commerce, SNURs, section 4 test rules and others.

"There are several statutory and regulatory authorities that relate to the regulation and testing of chemicals that may be relevant to natural gas drilling activities and which EPA is reviewing with respect to hydraulic fracturing," EPA says.

Since sending the letter, EPA has announced on its website that it would grant portions of a petition from environmentalists to craft a rule under TSCA to require the gas industry to submit a wealth of health and safety information.

But the agency has not yet released its formal response to the petition, which has been pending for review at the White House since December. Heather Zichal, President Obama's energy and climate adviser, told the Natural Gas Roundtable June 21 that the administration will seek to ease reporting burdens associated with the rules on industry.

Untested EPA Authorities

EPA has also sought to use some of the previously untested authorities in enforcement actions. For example, EPA Region III during the past year has issued a slew of CWA compliance orders under section 404 for what it claims are unlawful dredge-and-fill activities at natural gas development sites.

And EPA cited section 112(r) of the Clean Air Act in a May 1 letter that Region III sent to Range Resources concerning inspections at several of its Pennsylvania sites, seeking a host of information including the process hazard analysis for each operation, equipment data, documentation of administrative controls to ensure tanks are not overfilled, total quantity of each chemical and other data.

But EPA also indicates that it may be able to skirt some of the exemptions. For instance, the 1988 RCRA exemption that excludes most exploration and production wastes from strict subtitle C hazardous waste requirements cannot apply to wastes "not uniquely associated with gas production," the letter says. "Therefore, waste streams commonly produced at other types of industrial facilities, such as waste lubricants and solvents, are not exempt, nor are unused products that leaked or spilled, such as unused drilling mud or fracturing fluid spilled on the ground."

Further, state subtitle D programs for solid wastes can regulate some types of wastes, such as produced water and flowback, the letter says. -- Bridget DiCosmo (bdicosmo@iwpwnews.com This e-mail address is being protected from spambots. You need JavaScript enabled to view it)

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